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Single Bench

IN THE HIGH COURT OF JUDICATURE OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO. 634 /2005

APPELLANT:-
(IN JAIL)

(28/12/05)

filed on 03/8/07
by Shri Hemant Gupta Advocate

R to D.R. (J) 03/8/07

Santosh
S/O- Mohan Lal Sahu
Aged about 35 years
Village- Orchha Colony Nawagaon
Police Station- Orchha
Distt- Chhatarpur (M.P.)

VERSUS

RESPONDENT:-

State of Chhattisgarh
Through:- Station House Officer
Police Station- Dhamtari
District -Dhamtari (C.G.)

MEMO OF APPEAL
UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL PROCEDURE.

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 634/2005

Santosh

Vs.

State of Chhattisgarh

Post for judgment: 13.02.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

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A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 634/2005

Santosh

Vs.

State of Chhattisgarh

Single Bench: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Present:
Shri Shailendra Dubey, learned counsel with Shri Y.C. Sharma, learned counsel for the appellant.
Shri Ashish Shukla, G.A. with Shri U.K.S.Chandel, P.L. for the State.

J U D G M E N T

(Delivered on 13th day of February 2006)

This appeal is directed against the judgment dated 1.8.2005 delivered by Smt. Maitriae Mathur, Special Judge, Raipur in Special Case No.3/2002 whereby the appellant was convicted under Section 20(b)(ii) read with Section 8 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and was sentenced to undergo rigorous imprisonment for three years and a fine of Rs.25,000/-, in default of the same, to undergo additional R.I. for six months.

2. Brief facts of the case are that upon receiving secret information on 28.12.2001 about the possession of ganja by the appellant, Bharati Sori, P.S.I. P.S. Arjuni searched the appellant near bus-stand Dhamtari. The appellant was holding an air-bag. After completion of necessary legal formalities, the air-bag was searched. It was found to contain *ganja* like substance which upon weighment was found to be 4 kgs. Out of this two samples of 100 grams were

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prepared and sealed. The remaining 3 K.g. 800g.m. ganja was also sealed. The bag along with two sample packets were entrusted to Head Constable Jeevanlal Ratre PW-6 for safe custody and were sent on 31.12.2001 vide memo of Superintendent of Police, Dhamtari to Forensic Science Laboratory through Constable Vitthal Ram. The F.S.L. after examining the contents opined that the bag as well as the sample packets contained *ganja*. After completion of investigation, the appellant was prosecuted under Section 20(B) of the Act. The accused was charged under Section 20(b)(i) read with Section 8 of the Act [Clause (i) relates to contravention relating to cultivating any cannabis plant.]

3. The accused-appellant abjured his guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as 6 witnesses. The report of the F.S.L. was not tendered by the prosecution in evidence. The trial Court relying upon the evidence led by the prosecution convicted the appellant under Section 20(b)(ii) [Charge was under Section 20(b)(i) of the Act] read with Section 8 of the Act and sentenced him as aforesaid in paragraph 1.

4. Shri Shailendra Dubey, learned counsel for the appellant has assailed the impugned judgment only on the ground that in the absence of proof of the report of F.S.L., the evidence led by the prosecution did not establish that the substance seized from the appellant, if any, was *ganja*. On this ground alone, he argued that the appellant was entitled to be acquitted. On the other hand, Shri Ashish Shukla, learned Government Advocate has argued in support of the impugned judgment, though formally.

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5. Having heard the rival contentions and after perusing the record of special Case No.3/2002, this appeal deserves to be allowed. In order to sustain a conviction under Section 20(b)(ii)(B) read with Section 8 of the Act, the prosecution has to establish beyond doubt that the substance seized from the appellant was *ganja*. It is true that under Section-293 Cr.P.C., the report of the Assistant Chemical Examiner of the Forensic Science laboratory, if tendered by the prosecution in evidence, may be used as evidence against the accused. In this case, the report of the F.S.L. was not tendered as evidence by the prosecution. It, therefore, could not be used as evidence against the accused. A perusal of the unexhibited report of the F.S.L. dated 14.1.2002 also shows that the portion relating to the condition of the packets and the seals affixed thereon is missing. That portion of the report of the F.S.L. is also missing which would have indicated the date when the sample was received in the F.S.L. In a prosecution under Section 20(b)(ii) (B) of the Act, the prosecution is also required to establish beyond doubt that the substance examined by the F.S.L. was the same which was seized from the appellant. It has also to establish that the substance was received in the F.S.L. without any unexplained delay so as to rule out any possibility of tampering with the sample. The learned trial Judge did not consider it necessary that the report of the F.S.L. should be tendered in evidence and exhibited by the prosecution as required under Section-293 Cr.P.C. She also did not consider it necessary to put a question to the accused regarding the report of the F.S.L. while examining him under Section-313 Cr.P.C. It clearly overlooked this requirement of law and observed in paragraph 17 upon a perusal of the case that it was proved that the sample had been sent to the F.S.L. which had opined that the sample had contained *ganja*. The accused-appellant was thus deprived of the

right to cross-examine the Assistant Chemical Examiner of the Forensic Science Laboratory since the report of the F.S.L. was neither tendered as evidence by the prosecution nor was put to him under Section-313 Cr.P.C. In the absence of tendering in evidence of the report of the F.S.L. by the prosecution, the conviction of the appellant under Section 20(b)(ii)(B) read with Section 8 of the Act cannot be sustained in the eye of law since in the absence of the documentary evidence i.e. the report of the F.S.L. it could not be held that the substance seized from the appellant, was ganja.

6. Independent witnesses Daya Shanker P.W.3 and Rajkumar P.W.4 had also turned hostile and did not support the prosecution case. The prosecution case is that, the accused-appellant was found in possession of 4 K.G. Ganja out of which 2 samples of 100 g.m. each were taken and sealed. However, the testimony of Head Constable Jeevan lal Ratre PW-6 clearly shows that the S.H.O. of P.S. City Kotwali, Dhamtari had given him one sealed packet containing 4 K.G. ganja and two unsealed cloth bags each containing 100 g.m. ganja. This is also corroborated by Head Constable Ramesh Sahu PW-5. This shows total non-compliance of the mandate of Section-55 of the Act wherein the S.H.O. of the concerned Police Station is required to affix his seal on the sealed samples and packet entrusted to him for safe custody in Malkahana. In the above circumstances, the possibility that the sample which was sent to the F.S.L. was tampered and was not the substance which was seized from the accused/appellant could not be ruled out.

6. From the foregoing discussion, it is clear that the conviction of the appellant under Section 20(b)(ii) read with Section 8 of the Act

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and the sentence imposed thereunder cannot be sustained in the eye of law.

7. In the result, the appeal is allowed and the conviction of the appellant under Section 20(b)(ii) read with Section 8 of the Act and the sentence imposed thereunder are set aside. The appellant shall be set at liberty forthwith, if not required in any other case. Fine, if paid, shall be refunded to the appellant.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Anjani